IN THE COURT OF APPEALS OF THE STATE OF ALASKA

DANNY JOSEPH NICKOLAI,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-10838
Trial Court No. 3AN-07-4660 CR

MEMORANDUM OPINION

No. 6338 — May 25, 2016

Appeal from the Superior Court, Third Judicial District, Anchorage, Jack Smith, Judge.

Appearances: Andrew Steiner, Attorney at Law, Bend, Oregon, for the Appellant. Timothy W. Terrell, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Michael C. Geraghty and Craig W. Richards, Attorneys General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, and Allard, Judge.

Judge ALLARD.

A jury convicted Danny Joseph Nickolai of two counts of first-degree sexual assault and one count of second-degree sexual assault for sexually assaulting a woman in Campbell Creek Park in Anchorage.

On appeal, Nickolai argues that the superior court erred in permitting the State to introduce evidence of the victim's on-the-scene identification, which Nickolai

asserts was unreliable and obtained through impermissibly suggestive identification procedures. Nickolai also argues that without the victim's identification, the police lacked probable cause to arrest him, and therefore all evidence obtained subsequent to his arrest should have been suppressed. Lastly, Nickolai asserts that the trial court erred in admitting statements he made to police during the identification procedure because he claims that the statements were obtained in violation of his *Miranda* rights.

For the reasons explained here, we find no merit to these claims and affirm Nickolai's convictions.

Background facts and proceedings

On the afternoon of May 5, 2007, the police received a report that a sexual assault had occurred in Campbell Creek Park in Anchorage. The 911 caller, Edward Willard, reported that a woman had approached him and said she had been sexually assaulted in the woods.

Anchorage Police Officers Derek Davison and Gina Burington were the first to respond to the scene and contact the victim, H.M. The officers observed that H.M. was crying and injured and appeared to be intoxicated. H.M., who was homeless and living in the park at the time, reported that a man had followed her into the woods, punched her in the face, and raped her. In a later statement, H.M. explained that she had been drinking that day with a group of people including the 911 caller (Willard) and the alleged assailant. She said she had left the group to go check on her things at her camp and that when she sat down on a log to light a cigarette, the man came up behind her and knocked her on the head. H.M. stated that the man grabbed her by the hair and punched her, then he choked her and ripped her pants off. When H.M. started to call for help, the man squeezed her neck to silence her. She reported that he penetrated her vaginally and attempted to penetrate her anally. H.M. later stated that the man also sucked on and bit

her breast and tried to put his penis in her mouth. Ultimately, H.M. was able to break away from him and run for help.

When officers asked H.M. about the assailant and where the assault had occurred, H.M. described the assailant as a "Native guy" with medium length hair, and said he had been wearing a black jacket. H.M. said that the man was homeless, but she did not know his name.

The officers then escorted H.M. toward the woods, and H.M. pointed toward the spot where the assault occurred. As they neared the location of the assault, the officers saw the appellant, Danny Nickolai, sitting down against a tree. Nickolai was about fifty yards from the spot where H.M. said the assault occurred, and he matched the general description that H.M. had given the officers. The officers did not see any other Native males in the area.

The two officers approached Nickolai for questioning. Nickolai had a bottle of liquor with him, and he was heavily intoxicated. Burington asked Nickolai general questions about how long he had been in the park and who he had been drinking with that day. Nickolai claimed that he had been drinking alone. Davison asked Nickolai if he had any weapons on him and patted him down, but the officers did not place Nickolai in handcuffs.

During this initial questioning, Burington ran a warrant check on Nickolai and discovered that he had a sex offender registration requirement. Burington then asked questions about where Nickolai was living to determine if he was living at the registered address. Nickolai told the police that the registration requirement was connected to an attempted sexual assault conviction and that the victim had been a fifty-two-year-old woman.

The officers' questions then became more pointed. Burington asked Nickolai twice if he had had sex with anyone that day. Both times, Nickolai denied

having sex with anyone. The officers then mentioned H.M.'s allegations, and Nickolai denied being involved. Nickolai maintained that he had been walking by himself and had not touched or bothered anybody. The officers asked if Nickolai would stand up and walk out to the path with them. Nickolai agreed, and the officers escorted him 20-30 feet to a more open area of the park.

While Officer Burington stayed with Nickolai, Officer Davison left and went to where H.M. was. Davison asked H.M. additional questions about what the assailant was wearing, repeatedly referring to him as "the bad guy." Davison asked H.M. if she would recognize the person if she saw him, and she said she would. Davison told H.M., "we think we have ... the guy, the bad guy." H.M. asked if the man had the medium length hair she had described and if he was Native. Officer Davison responded, "And ... yes ... [w]e're gonna walk down here and I'm gonna have you look up and then I'm gonna ... have you tell me if that's him or not."

Davison then proceeded to walk with H.M. in the direction of Officer Burington and Nickolai, but H.M. told Davison that she could not see the suspect clearly because of her poor vision. They walked closer and Davison asked again if H.M. could see Nickolai. H.M. again said she could not, and Davison asked how close Nickolai would need to be for H.M. to see him clearly. When Davison determined that H.M. would need to observe Nickolai from a very close range, he radioed Officer Burington and told her that he was going to do the show-up from his police cruiser.

Officer Davison then drove H.M. to the side of the park, and when the car was within fifteen feet of Nickolai, H.M. suddenly said, "That's him." Officer Davison repeatedly asked H.M. if she was sure and whether she needed to get closer. She responded each time with, "That's him." At one point she said, "That's a Native guy. That's him." When Officer Davison started to ask H.M. for more details about the assault, she again repeated, "That is the guy."

Around the same time, another officer, Officer Kyle Hemmesch, took Willard, the 911 caller, to view Nickolai. Willard identified Nickolai as the person who left the drinking group shortly after H.M. walked away toward her camp.

The officers then took Nickolai into custody and obtained a search warrant to collect DNA samples from Nickolai's hands and penis. In a post-arrest interview with a detective in which Nickolai was apprised of his rights under *Miranda* and waived them, Nickolai admitted to having sex with H.M. In this interview, he claimed that the two of them had left the drinking group together, had some more drinks, and then had consensual sex.

H.M. agreed to participate in a sexual assault exam. The Sexual Assault Response Team nurse collected DNA samples from H.M. and photographed her injuries. H.M. exhibited injuries consistent with her report of the assault. The Anchorage crime lab later tested the swabs from H.M's breast area, Nickolai's penis, and Nickolai's hands. Nickolai's DNA was found on the breast swab from H.M. H.M.'s DNA was also found on Nickolai's hands and penis.

Nickolai was indicted on one count of first-degree sexual assault for vaginally penetrating H.M., one count of attempted first-degree sexual assault for attempting to anally penetrate H.M., one count of attempted first-degree sexual assault for attempting to force his penis in H.M.'s mouth, and one count of second-degree sexual assault for sucking on and biting H.M.'s breasts.[1]

[1] AS 11.41.410(a)(1), AS 11.41.410(a)(1), AS 11.31.100, and AS 11.41.420(a)(1), respec- tively.

Why we conclude that the trial court did not err in denying Nickolai's motion to exclude evidence of the show-up identification at trial

Prior to trial, Nickolai filed a motion to exclude the evidence of H.M.'s identification at trial. The superior court denied the motion, concluding that the show-up was necessary and no more suggestive than a typical show-up.

On appeal, Nickolai renews his argument that the show-up was unnecessarily suggestive and that the admission of this out-of-court identification at trial violated his right to due process. Nickolai contends that the police could have obtained an identification from the victim through less suggestive means such as a photo array or a line-up. Nickolai also criticizes the police for repeatedly referring to him as "the bad guy" and telling H.M. that they had the "bad guy."

As a general matter, out-of-court identifications that are a product of unnecessarily suggestive procedures are inadmissible at trial if the identification is determined unreliable under the totality of the circumstances.[2] Historically, to determine whether a pretrial identification procedure violates a defendant's due process rights, we have followed the test set out in *Manson v. Brathwaite*.[3] In applying this test, "[w]e first ask if the identification procedure is unnecessarily suggestive — if so, we then ask if the identification is nevertheless reliable based on the totality of the circumstances."[4] In recent cases, we have questioned whether the *Brathwaite* test is sufficiently protective

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[2] *Manson v. Brathwaite*, 432 U.S. 98 (1977).

[3] *Id.* at 108-09.

[4] *White v. State*, 773 P.2d 211, 214 (Alaska App. 1989) (citing *Brathwaite*, 432 U.S. at 108-09).

of a defendant's due process rights, given current awareness of the problems with eye-witness identification and the flaws in the *Brathwaite* reliability test.[5]

In his appeal, Nickolai urges this Court to overturn the *Brathwaite* test and to adopt a test excluding any out-of-court identifications obtained through unnecessarily suggestive police identification procedures,[6] or a totality of the circumstances test similar to the one adopted by New Jersey.[7]

We conclude that we need not resolve this issue in Nickolai's case because any error in admitting this identification evidence at Nickolai's trial was harmless beyond a reasonable doubt. At trial, the jury heard Nickolai's recorded interview with the police, in which Nickolai claimed that he had consensual sex with H.M. The jury also heard that Nickolai's DNA was found on H.M.'s breasts and that H.M.'s DNA was found on Nickolai's hands and penis. Moreover, Nickolai did not directly contest the issue of identity at trial. That is, he never argued that a different person sexually assaulted H.M. Instead, Nickolai challenged H.M.'s claim that sexual penetration had occurred, attacking H.M.'s credibility and ability to accurately perceive the events. Nickolai also argued that the DNA evidence did not establish that penetration occurred, and he asserted that both he and H.M. were too intoxicated to know what really happened.

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[5] *See, e.g.*, *Tegoseak v. State*, 221 P.3d 345 (Alaska App. 2002); *see also Augustine v. State*, 355 P.3d 573, 586 (Alaska App. 2015); *Pierce v. State*, 261 P.3d 428, 435 (Alaska App. 2011).

[6] *See Commonwealth v. Johnson*, 650 N.E.2d 1257, 1260-64 (Mass. 1995) (adopting per se rule of exclusion where pretrial show-up identification procedures are found unnecessarily suggestive); *People v. Adams*, 423 N.E.2d 379, 383-84 (N.Y. 1981) (same).

[7] *See State v. Henderson*, 27 A.3d 872, 918-22 (N.J. 2011); *see also State v. Ramirez*, 817 P.2d 774, 780-81 (Utah 1991) (adopting a modified set of factors according to which Utah courts may assess reliability); *State v. Hunt*, 69 P.3d 571, 576-77 (Kan. 2003) (adopting Utah's *Ramirez* factors).

We therefore reject this claim of error.

Why we conclude that the trial court did not err in denying Nickolai's motion to suppress the evidence obtained as "fruits" of the unnecessarily suggestive show-up identification

Prior to trial, Nickolai moved to suppress all evidence obtained as a result of his arrest (including the DNA evidence and Nickolai's statements during the police interview), asserting that the police lacked probable cause to arrest him without H.M.'s faulty and unnecessarily suggestive show-up identification.

Probable cause to arrest exists where "a person of reasonable caution would be justified in the belief that an offense has been committed and the defendant committed it."[8] "[P]robable cause requires only a fair probability or substantial chance of criminal activity, not an actual showing that such activity occurred."[9]

Moreover, probable cause can be based on evidence that is reasonably trustworthy, even if it is later determined to be inadmissible at trial.[10] Thus, the question of whether a victim's identification of the defendant was unnecessarily suggestive for purposes of admissibility at trial is a different inquiry from the question of whether it

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[8] *State v. Grier*, 791 P.2d 627, 632 n.3 (Alaska App. 1990).

[9] *Van Sandt v. Brown*, 944 P.2d 449, 452 (Alaska 1997).

[10] *Brinegar v. United States*, 338 U.S. 160, 172-75 (1949); *see also* 2 W. LaFave, Search and Seizure, § 3.2(d), at 71-72 & n.146 (5th ed. 2012) (citing *Phillips v. Allen*, 668 F.3d 912 (7th Cir. 2012)) ("[P]robable cause ... can be grounded in an identification by a witness which, under *Neil v. Biggers*, would be inadmissible at trial because it was the result of unduly suggestive procedures.").

could reasonably be relied on by the police for purposes of establishing probable cause to arrest.[11]

Here, at the time of arrest, the police had a detailed description of the assailant — as Davison later testified at an evidentiary hearing, H.M. described a "Native male, 30 to 40 years of age, 5'6", heavy build, unshaven, medium length black with silver hair, black jacket, blue jeans." Nickolai closely resembled that description and the police found Nickolai in the area where the assault occurred. The officers had also discovered that Nickolai was a registered sex offender and that the related offense had been an attempted sexual assault of a middle-aged woman. In addition, a neutral witness, Edward Willard, identified Nickolai as the person who had followed H.M. into the woods after she left the drinking group (Nickolai does not challenge the admission of that identification).

In addition, although we agree with Nickolai that there were unnecessarily suggestive elements to the show-up identification in this case, the police still had reason to believe that the victim's identification was reliable, which was relevant to their overall assessment of probable cause to arrest. We note that H.M. appeared unswayed by one officer's suggestion that Nickolai was the "bad guy," and that H.M. refused to make any identification until she could see Nickolai clearly from the police cruiser.

Given the totality of these circumstances, we conclude that the officers had probable cause to arrest Nickolai and the superior court therefore did not err in denying his pretrial motion to suppress.

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[11] *See Brinegar*, 338 U.S. at 172-73 (concluding that holding pre-arrest evidence to the admissibility standards at trial "goes much too far in confusing and disregarding the difference between what is required to prove guilt in a criminal case and what is required to show probable cause for arrest or search").

Why we conclude that Nickolai's statements to the police during the show-up identification were not obtained in violation of Nickolai's Miranda rights

Prior to trial, Nickolai filed a second motion to suppress, arguing that he was subjected to custodial interrogation when the officers stopped him in the park and questioned him, and that the court should therefore suppress all of the statements made during this initial contact under *Miranda*. The superior court denied the motion, finding that Nickolai was not in custody for purposes of *Miranda* during his interaction with the officers.

On appeal, Nickolai has abandoned the claim that he was in *Miranda* custody through the entire police encounter, and instead argues that he was in custody for purposes of *Miranda* once the officers led him out of the woods for the show-up identification. He therefore argues that the court erred in failing to suppress the statements he made to Officer Burington during the show-up identification — *i.e.*, that he did not know H.M. and had not seen her before.

A defendant is entitled to *Miranda* warnings when the defendant is subjected to custodial interrogation.[12] Custodial interrogation is questioning initiated by the police "after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[13] In determining whether a person is subjected to custodial interrogation for purposes of *Miranda*, the courts are required to

[12] *See Miranda v. Arizona*, 384 U.S. 436 (1966); State v. Smith, 38 P.3d 1149, 1153 (Alaska 2002).

[13] *Miranda*, 384 U.S. at 444.

focus on "whether the circumstances were impermissibly coercive from the point of view of a reasonable, *innocent* person."[14]

Here, the trial court found that the show-up identification was conducted in a conversational manner, that Nickolai was in an open and public area, and that by the time Burington's question to Nickolai — "Do you know this lady?" — was delivered, any accusatory atmosphere had dissipated and a reasonable person would have felt free to break the contact. We agree with the superior court that the circumstances of the show-up did not rise to the level of custodial interrogation sufficient to trigger the required warnings under *Miranda*. We therefore affirm the ruling of the superior court.

Conclusion

The judgment of the superior court is AFFIRMED.

[14] *Long v. State*, 837 P.2d 737, 742 n.1 (Alaska App. 1992) (emphasis in original).